

No. 21-295

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IN THE  
**Supreme Court of the United States**

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In re AMERICA'S FRONTLINE DOCTORS, et al.,  
*Petitioners*

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**ON PETITION FOR WRIT OF MANDAMUS TO THE  
UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

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**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF MANDAMUS**

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## INTRODUCTION

Respondents Kim A. Wilcox, Chancellor of the University of California Riverside; Howard Gillman, Chancellor of the University of California Irvine; The Regents of the University of California; and Michael V. Drake, President of the University of California (collectively, “Respondents”), respectfully request that the Petition for Writ of Mandamus be denied. Petitioners here seek a common law writ of mandamus under 28 U.S.C. § 1651(a), which this Court has described as “a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’” *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004). Such a writ may only be issued if the petitioners meet the threshold criteria of having “no other adequate means to attain the relief [they] desire[]” and where the petitioners’ “right to issuance of the writ is ‘clear and indisputable.’” *Id.* at 380-81. Here, Petitioners fail to meet the basic threshold criteria for this extraordinary relief. This Petition is a transparent and meritless attempt to seek an expedited review of the denial of a temporary restraining order, and to circumvent the normal procedures that govern appellate procedure and review.

## STATEMENT

This summer, the University of California (“UC”) issued its COVID-19 Vaccine Policy (“Policy”) applicable to employees and students. The Policy requires, with limited exceptions, that students and employees provide proof that they have been vaccinated against SARS-CoV-2—the novel coronavirus which causes the deadly disease COVID-19—as a condition of their physical access to campus

facilities. The purpose of the Policy is to facilitate the protection of the health and safety of the University community and that of the general public. Petitioners' Appendix B, at pp. 7, 11 (District Court Order). UC's Policy is the product of consultation with UC infectious disease experts and ongoing review of the evidence from medical studies concerning the dangerousness of COVID-19 and emerging variants of concern. *Id.* at p. 4.

Petitioners filed a 325-page ex parte application for a TRO, seeking to enjoin UC from implementing its COVID-19 vaccine Policy on the ground that the Policy does not exempt previously infected individuals from the vaccination requirement. *See* Petitioners' Appendix C (containing excerpts of application). Consistent with the nature of a TRO, Respondents had only 24 hours to respond. *See* Judges Procedures of Hon. Jesus G. Bernal, <https://www.cacd.uscourts.gov/honorable-jesus-g-bernal> (last visited Sept. 20, 2021). In that time, Respondents obtained short declarations addressing the key points in opposition; had they had an opportunity to fully respond in the context of a properly noticed motion for preliminary injunction, Respondents would have submitted a number of expert declarations to support their arguments. *See* Petitioners' Appendix C, 1-ER-56 n. 4, 1-ER-61 (noting in opposition papers to TRO that UC Defendants intend to submit evidence supporting the Policy, including evidence from medical and public health experts in opposition to any motion for preliminary injunction).

The District Court did not hold a hearing and denied Petitioners' ex parte application for TRO and order to show cause why a preliminary injunction

should not issue. The District Court held that Petitioners were not likely to succeed on the merits, failed to meet their burden to show irreparable harm, and that the balance of equities and the public interest weighed heavily against Petitioners' requested relief. *America's Frontline Doctors v. Wilcox*, No. 5:21-cv-01243 (C.D. Cal. Jul. 30, 2021). Petitioners' Appendix B (District Court Order).

Following the denial of the TRO, Petitioners did not file a motion for preliminary injunction. Petitioners did, however, take the extraordinary measure of filing a petition for writ of mandamus to the United States Court of Appeals for the Ninth Circuit, asking the Circuit Court to overturn the District Court's order. The Court of Appeals summarily denied that petition, holding that Petitioners "have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus." *America's Frontline Doctors v. U.S. Dist. Court*, No. 21-71209 (9th Cir. Aug. 11, 2021) (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977)). Petitioners' Appendix A (Ninth Circuit Order).

This Petition for Writ of Mandamus followed.

### **REASONS TO DENY THE PETITION**

"[O]nly exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy" of mandamus relief. *Kerr v. U.S. Dist. Court for N.D. Cal.*, 426 U.S. 394, 402 (1976). Petitioners fall far short of meeting this high standard. First, this Petition is a patent attempt to end-run the restrictions on appealability from the denial of a TRO and is not the proper subject for mandamus relief.

Second, Petitioners have no clear and indisputable right to mandamus relief, as evidenced by the District Court's order denying Petitioners' application for a TRO. Third, Petitioners' Questions Presented are not properly before this Court because they were either not presented below or rely on faulty assumptions and unfiled declarations. Finally, Petitioners' claims are moot.

**I. This Petition Is a Patent Attempt to Circumvent the Restrictions on Appealability From an Order Denying a TRO.**

No exceptional circumstances exist such that Petitioners should be permitted to circumvent the restrictions on the appealability of an order denying a TRO by filing this Petition. "Ordinarily, an appeal does not lie from the denial of an application" for TRO because "such appeals are premature and are disallowed 'in the interests of avoiding noneconomical piecemeal appellate review.'" *See Religious Tech. Ctr. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (quoting *Kimball v. Commandant Twelfth Naval District*, 423 F.2d 88, 89 (9th Cir. 1970)). This is especially true where, as here, the parties did not participate in an adversarial hearing in which each side to the dispute had an opportunity to present full evidence. *See Off. of Personnel Mgmt. v. Am. Fed'n of Gov't Emps.*, 473 U.S. 1301, 1305 (1985); *Washington v. Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 448 (2017). Indeed, TROs are, by definition, temporary, lasting no more than 28 days – during which time the party may present its case for a preliminary injunction.

Petitioners' inability to appeal directly from the denial of a TRO does not open the door to mandamus relief. Petitioners could have filed a motion for preliminary injunction and, if that motion were denied, immediately appealed from the ensuing order.

Or, if as Petitioners contend, this case fits within the narrow exception in which a motion for a preliminary injunction would be futile, a direct appeal may have been permitted from the denial of the TRO. In other words, under Petitioners' futility theory, Petitioners should have filed a notice of appeal and sought appellate review in the ordinary course. Contrary to Petitioners' assertions here (Pet. at 9), the ability to directly appeal in those narrow circumstances does not invite the filing of a petition for writ of mandamus. "[E]xtraordinary writs cannot be used as substitutes for appeals[.]" *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953).

## **II. Petitioners Cannot Satisfy Their Burden of Showing a Clear and Indisputable Right to Mandamus Relief.**

Mandamus is available only where Petitioners have a clear and indisputable right to relief, *Kerr*, 426 U.S. at 403, and Petitioners have made no such showing. At bottom, the decision whether to issue a temporary restraining order is a matter of equitable discretion, not strict legal command, and thus a rather inapt candidate for mandamus relief. And for all of the reasons set forth in the District Court's order denying the TRO, Petitioners' right to relief in this case is neither clear nor indisputable. Petitioners' Appendix C (District Court Order).

This is all the more so where Respondents did not have a chance to present their full case in

opposition at the District Court. Petitioners now argue that the lack of evidence submitted by Respondents in response to the TRO supports the granting of this Petition, going so far as to state that Respondents' declarations in opposition to the ex parte application for TRO were "completely devoid of scientific citations" and that "[Respondents'] experts were unable to provide any scientific data" to rebut Petitioners' arguments. Petition at 7. But, such arguments are precisely why appeals are not taken from orders granting or denying TROs. Here, the District Court did not hold a hearing, and Respondents were not afforded an opportunity to present expert declarations to more thoroughly rebut Petitioners' assertions.

### **III. Petitioners' Questions Presented Were Not Presented Below and Rely on Faulty Assumptions.**

Respondents also object to the Questions Presented by this Petition, as they were not properly presented below and rely on faulty assumptions and unfiled declarations.

The first question presented relies on a fact that is no longer true. It asks whether the "District Court commit[ted] an abuse of discretion by neglecting to enforce Federal law re EUA." It assumes that the only COVID-19 vaccines available are those authorized by the Food and Drug Administration ("FDA") for Emergency Use Authorization. The FDA, however, has since approved a COVID-19 vaccine on August 23, 2021. See Comirnaty and Pfizer-BioNTech COVID-19 Vaccine, FDA, <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid->

19/comirnaty-and-pfizer-biontech-covid-19-vaccine (last visited Sept. 20, 2021). Furthermore, the relief sought from the District Court was an injunction of UC's Policy, not an enforcement of "Federal law re EUA." Petitioners' Appendix C, 1-ER-99. Thus, the question posed was not considered by the District Court.

The second question presented relies on evidence that was never submitted. Petitioners posit an error in the standard of review and predicate it upon the "undeniable scientific consensus" supported by the purported declaration of Joseph A. Ladapo, MD, PhD. From the legal briefing it appears Petitioners hoped to tender evidence regarding infection-induced immunity (called "natural immunity" by Petitioners) and the risk of injury from COVID-19 vaccines. But, the purported declaration was never presented to either the District Court or the Ninth Circuit Court of Appeals. *See* Petition at 30 & Appendix.

#### **IV. Article III Is a Bar to the Petition Because Petitioners Lacked Standing at the Outset, or Their Claims Are Moot.**

Finally, Article III is a bar to the requested relief. Petitioners lacked standing either at the outset of litigation, or their claims are now moot. On September 24, 2021, Respondents filed a motion to dismiss all claims in the District Court on these grounds.<sup>1</sup> Mot. to Dismiss, *America's Frontline Doctors v. Wilcox*, No. 5:21-cv-01243 (C.D. Cal. Sept.

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<sup>1</sup> Respondents also moved to dismiss all claims against The Regents of the University of California and all state law claims as barred under the Eleventh Amendment.

24, 2021) (Doc. 25). The hearing on the motion to dismiss is set for October 25, 2021. Indeed, the pendency of these motions to dismiss, not yet addressed by the District Court, provides further reason why mandamus with respect to the decision below denying Petitioners' request for a TRO would be inappropriate.

All three Petitioners lack Article III standing. For the reasons set forth in the motion to dismiss pending in the District Court, the two student Plaintiffs lack Article III standing because they have no remaining claim of injury. Due to student privacy laws, the factual basis of Respondents' motion to dismiss is subject to a motion to seal, and for that reason, is not discussed further here. It is available through the District Court, or can be provided by the parties on request.

Petitioner America's Frontline Doctors lacks standing because it is not subjected to the Policy and cannot demonstrate any likelihood that it would ever be subjected to the Policy. Any derivative standing that America's Frontline Doctors may claim via the individual Plaintiffs falls with the mootness of the individual Plaintiffs' claims.

### **CONCLUSION**

The Petition for Writ of Mandamus should be denied.

Respectfully submitted,

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